DATO' SRI MOHD NAJIB HJ ABD RAZAK v. PP & OTHER APPEALS (NO 2)

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
ABANG ISKANDAR CJ (SABAH & SARAWAK)
NALLINI PATHMANATHAN FCJ
MARY LIM FCJ
MOHAMAD ZABIDIN MOHD DIAH FCJ
[CRIMINAL APPEAL NOS: 05(L)-289-12-2021, 05(L)-290-12-2021 & 05(L)-291-12-2021]
16 AUGUST 2022

Abstract – *Where counsel has accepted a brief, he should be deemed as 'reasonably certain of being able to appear and represent the client on the required day.' The general rule is that counsel shall make every effort to be ready for trial (and by extension appeals) on the day fixed. In this case, although the appellant has the right to discharge his former solicitors and appoint new solicitors, he could not then after having made that decision turn around and say his new lawyers are not ready to proceed with the trial. The new lawyers too are not entitled to say they need more time to prepare, knowing full well dates had been fixed in advance. A request for adjournment on such grounds that were neither cogent nor reasonable ought to be refused.*

CIVIL PROCEDURE: *Trial – Adjournment – Application to adjourn hearing of appeals – Change of solicitors – New counsel seeking to be given adequate time to prepare – Whether parties well aware of dates fixed for appeals – Whether counsel ought to make every effort to be ready to represent client on required day – Whether grounds in support of adjournment reasonable and cogent – Legal Profession (Practice and Etiquette) Rules 1978, rr. 6(a), 24(a), (v)*

LEGAL PROFESSION: *Solicitors – Change of solicitors – Application to adjourn hearing of appeals – New counsel seeking to be given adequate time to prepare – Whether parties well aware of dates fixed for appeals – Whether counsel ought to make every effort to be ready to represent client on required day – Whether grounds in support of adjournment reasonable and cogent – Legal Profession (Practice and Etiquette) Rules 1978, rr. 6(a), 24(a), (v)*

This was the appellant's application to adjourn the hearing of the appeals to a later date in three to four months. The basis of this application for adjournment was that the counsel for the appellant, Tuan Hj Hisyam Teh and his team, had only recently took over and that the appeals – spanning tens of thousands of documents – disclosed strong serious points to be canvassed and that his team be given adequate opportunity to do a good job. The defence sought an adjournment of these appeals for the simple reason that

they were not prepared. The respondent's position, however, was that the fixing of the dates of the appeals in August 2022 had been made known since as far back as the case management on 8 April 2022 – which was some four months ago. Parties were therefore well aware that the court would proceed on those dates. On 26 July 2022, the court received a letter from the appellant's former solicitors, Messrs Shafee & Co, stating that the appellant had discharged them as his solicitors on record. The appellant took it upon himself to discharge his solicitors to the present ones, Messrs Zaid Ibrahim Suflan TH Liew & Partners ('Messrs Zaid Ibrahim'), who in turn appointed Tuan Hj Hisyam Teh as lead counsel. Messrs Zaid Ibrahim requested for an urgent case management and sought permission to participate in a case management that was already fixed on 29 July 2022. They also stated their intention to put on record their motion to adjourn for the reason that a 'wholly new team had taken over the conduct of the above matter'. The court's reply in encl. 245, indicated, *inter alia*, the court's directions that the hearing of the appeals would proceed as scheduled on 15 August 2022 to 26 August 2022. In short, the court refused the adjournment. The court reminded the parties that the appeals would proceed as scheduled notwithstanding the change in solicitors. It was against this backdrop that an adjournment was sought once again.

Held (refusing adjournment)

Per Tengku Maimun Tuan Mat CJ, Abang Iskandar CJ (Sabah & Sarawak), Nallini Pathmanathan, Mary Lim, Mohamad Zabidin Mohd Diah FCJJ delivering the judgment of the court:

(1) Though the courts have absolute discretion to grant or refuse adjournments, such discretion must be exercised judiciously. What are judicious hinges on a proper and wholesome consideration of the facts and circumstances of the case before making a decision. The right to a fair trial is part and parcel of the right to life and personal liberty guaranteed under art. 5(1) of the Federal Constitution ('FC'). The right of the accused to meaningful legal representation by counsel of his choosing is another important component of the right to a fair trial, which is apparent from art. 5(3) of the FC. This right, however, is not absolute. (paras 13 & 14)

(2) All parties to this matter, including the appellant, were well aware that the appeals had been fixed for hearing on 15 to 26 August 2022 since April 2022 and the request for adjournment on the same ground had been refused. In this regard, r. 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ('1978 Rules') is most relevant. Where counsel has accepted a brief, he should be deemed as 'reasonably certain of being able to appear and represent the client on the required day.' The general rule is that counsel shall make every effort to be ready for trial (and by extension appeals) on the day fixed (r. 24(a) and (v) of the 1978 Rules). (paras 17-19)

(3) The 1978 Rules are not, in a sense, binding on the courts but they are nevertheless binding on members of the Bar who are obliged to comply with them. And they are indicative of the fact that any disciplined lawyer such as counsel for the appellant would not have accepted a brief with dates already fixed for hearing unless he was prepared. In fact, the appellant, having been well aware of the dates fixed for hearing, elected to discharge his former solicitors and appoint Messrs Zaid Ibrahim and Tuan Hj Hisyam Teh as his solicitors and counsel respectively. This was his right to do so but he could not, after having made that decision, turn around and say that his new lawyers were not ready to proceed with the hearing of the appeals. The new lawyers too, having accepted the brief, were not entitled to say that they need more time to prepare knowing fully well that the dates had been fixed well in advance. The request for the adjournment and the grounds in support thereof were neither cogent nor reasonable. (paras 20-22)

(4) Considerable public funds would be wasted if granting an adjournment in a case of this kind was an easier option. Article 8 of the FC and the Rule of Law demand that the appellant be treated just like any other accused. While the appellant was entitled to his right to change his counsel, he was not entitled to make this choice at the expense of the court, the prosecution or the entire justice system. Another very significant component of the right to a fair trial is that justice cannot be unduly delayed. For these reasons, the appellant's motion to adjourn and vacate these appeals for a period of at least three to four months was refused. (paras 24-27)

Bahasa Melayu *Headnotes*

Ini adalah permohonan perayu untuk menangguhkan perbicaraan rayuan ke tiga hingga empat bulan kemudian. Asas permohonan penangguhan ini adalah bahawa peguam perayu, Tuan Hj Hisyam Teh dan pasukannya, baru-baru ini mengambil alih dan bahawa rayuan – yang merangkumi puluhan ribu dokumen – mendedahkan isu-isu serius yang perlu dikemukakan dan pasukannya diberi peluang yang mencukupi untuk melakukan tugas mereka dengan baik. Pihak pembelaan memohon penangguhan rayuan ini dengan alasan bahawa mereka tidak bersedia. Walau bagaimanapun, kedudukan responden adalah bahawa penetapan tarikh rayuan pada bulan Ogos 2022 telah diketahui sejak pengurusan kes pada 8 April 2022 – iaitu, kira-kira empat bulan lalu. Oleh itu, pihak-pihak sedar bahawa mahkamah akan meneruskan dengan tarikh-tarikh tersebut. Pada 26 Julai 2022, mahkamah menerima sepucuk surat daripada bekas peguam perayu, Tetuan Shafee & Co, yang menyatakan bahawa perayu telah melepaskan mereka sebagai peguamnya atas rekod. Perayu mengambil tanggungjawab untuk melepaskan peguamnya dan melantik Tetuan Zaid Ibrahim Suflan TH Liew & Rakan kongsi ('Tetuan Zaid Ibrahim') yang seterusnya melantik Tuan Hj Hisyam Teh sebagai peguam utama. Tetuan Zaid Ibrahim meminta pengurusan kes

segera dan memohon kebenaran untuk mengambil bahagian dalam pengurusan kes yang telah ditetapkan pada 29 Julai 2022. Mereka juga menyatakan niat mereka untuk memasukkan usul untuk penangguhan dengan alasan bahawa 'pasukan baharu telah mengambil alih pelaksanaan perkara di atas'. Balasan mahkamah di lampiran 245 menunjukkan, antara lain, arahan mahkamah bahawa perbicaraan rayuan akan berjalan seperti yang dijadualkan pada 15 Ogos 2022 hingga 26 Ogos 2022. Pendek kata, mahkamah menolak penangguhan tersebut. Mahkamah mengingatkan pihak-pihak bahawa rayuan-rayuan akan berjalan seperti yang dijadualkan walaupun terdapat perubahan peguam. Dengan latar belakang inilah penangguhan sekali lagi dituntut.

Diputuskan (menolak penangguhan)
Oleh Tengku Maimun Tuan Mat KHN, Abang Iskandar HB (Sabah & Sarawak), Nallini Pathmanathan, Mary Lim, Mohamad Zabidin Mohd Diah HHMP menyampaikan penghakiman mahkamah:

(1) Walaupun mahkamah mempunyai budi bicara mutlak untuk memberikan atau menolak penangguhan, budi bicara tersebut harus dilaksanakan dengan bijaksana. Apa yang bijaksana bergantung pada pertimbangan yang tepat dan menyeluruh mengenai fakta dan keadaan kes sebelum membuat keputusan. Hak untuk mendapat perbicaraan yang adil adalah sebahagian daripada hak untuk hidup dan kebebasan peribadi yang dijamin bawah per. 5(1) Perlembagaan Persekutuan ('PP'). Hak tertuduh untuk mendapat perwakilan undang-undang yang kukuh oleh peguam pilihannya adalah satu lagi komponen penting bagi hak untuk perbicaraan yang adil, yang jelas diperuntukkan bawah per. 5(3) PP. Hak ini, walau bagaimanapun, tidak mutlak.

(2) Semua pihak dalam perkara ini, termasuk perayu, mengetahui bahawa rayuan telah ditetapkan untuk dibicarakan pada 15 hingga 26 Ogos 2022 sejak April 2022 dan tuntutan penangguhan dengan alasan yang sama telah ditolak. Dalam hal ini, per. 6(a) Kaedah-kaedah Profesion Undang-Undang (Amalan dan Etika) 1978 ('Peraturan 1978') paling relevan. Apabila peguam menerima kes, dia harus dianggap sebagai 'cukup yakin dapat hadir dan mewakili anak guam pada hari yang ditetapkan.' Peraturan umum adalah bahawa peguam harus berusaha sedaya upaya untuk bersedia untuk perbicaraan (dan selanjutnya, rayuan-rayuan) pada hari yang ditetapkan (per. 24(a) dan (v) Peraturan 1978).

(3) Peraturan 1978 tidak, walau bagaimanapun, mengikat mahkamah tetapi tetap mengikat ahli-ahli Majlis Peguam yang wajib mematuhinya. Dan, mereka menunjukkan bahawa mana-mana peguam yang berdisiplin seperti peguam untuk perayu tidak akan menerima kes dengan tarikh yang telah ditetapkan untuk dibicarakan kecuali jika dia sudah bersedia. Sebenarnya, perayu telah mengetahui tarikh yang ditetapkan untuk dibicarakan, memilih untuk melepaskan bekas peguamnya dan melantik Tetuan Zaid Ibrahim dan Tuan Hj Hisyam Teh masing-masing sebagai

peguam dan penasihatnya. Ini adalah haknya tetapi dia tidak boleh, setelah membuat keputusan itu, berpusing balik dan mengatakan bahawa peguam baharunya tidak bersedia untuk meneruskan perbicaraan rayuan. Peguam baharu juga, setelah menerima kes itu, tidak berhak mengatakan bahawa mereka memerlukan lebih banyak masa untuk mempersiapkan diri, mengetahui sepenuhnya bahawa tarikh telah ditetapkan lebih awal. Permohonan penangguhan dan alasan yang menyokongnya tidak masuk akal dan tidak munasabah.

(4) Dana awam yang besar akan terbazir jika membenarkan penangguhan dalam kes seperti ini. Perkara 8 PP dan Rule of Law menuntut agar perayu diperlakukan seperti tertuduh lainnya. Sementara perayu berhak untuk menukar peguamnya, dia tidak berhak membuat pilihan ini dengan memudaratkan mahkamah, pendakwaan atau seluruh sistem keadilan. Komponen lain yang sangat penting daripada hak untuk perbicaraan yang adil adalah bahawa keadilan tidak dapat ditangguhkan. Atas sebab-sebab ini, usul perayu untuk menangguhkan rayuan-rayuan ini untuk jangka masa sekurang-kurangnya tiga hingga empat bulan ditolak.

Case(s) referred to:
Lai Cheng Chong v. PP [1993] 1 LNS 33 ***(refd)***
PP v. Mohtar Abdul Latiff [1980] 1 LNS 62 HC ***(refd)***
Yahya Hussein Mohsen Abdulrab v. PP [2021] 9 CLJ 414 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 5(1), (3), 8
Legal Profession (Practice and Etiquette) Rules 1978, rr. 6(a), 24(a), (b)

For the appellant - Hisyam Abdullah, Mohd Zaid Ibrahim, Liew Teck Huat, Rueben Mathiavaranam, Hannah Kam Zhen Yi, Kee Wei Lon, Low Wei Loke & Ong Kang Nyong; M/s Zaid Ibrahim Suflan TH Liew & Partners
For the respondent - V Sithambaram, Donald Joseph Franklin, Sulaiman Kho Kheng Fuei, Mohd Ashrof Adrin Kamarul & Manjira Vasudevan; DPPs
Watching Brief:
For the Bar Council - Tiu Foo Woei; M/s Azri, Lee Swee Seng & Co

Reported by Suhainah Wahiduddin

JUDGMENT
(Application for Adjournment)

Tengku Maimun Tuan Mat CJ, Abang Iskandar CJ (Sabah & Sarawak), Nallini Pathmanathan, Mary Lim, Mohamad Zabidin Mohd Diah FCJJ:

Introduction

[1] Having dismissed the motions to adduce additional evidence, we directed parties to proceed with the appeals. Learned counsel for the appellant, Tuan Hj Hisyam Teh, however, moves to adjourn the hearing of

the appeals to a later date in three to four months. The basis of his application for adjournment is that he and his team only recently took over and that the appeals – spanning tens of thousands of documents – disclose strong serious points to be canvassed and that his team be given adequate opportunity to do a good job.

[2] To put it bluntly, the defence seeks an adjournment of these appeals for the simple reason that they are not prepared.

[3] The respondent's position is that the fixing of the dates of the appeals in August 2022 has been known since as far back as the case management on 8 April 2022 – which is some four months ago. Parties were then advised that the court would proceed on the dates fixed. The court's minutes of the case management on 8 April 2022 confirm this. Parties were therefore well aware that the court will proceed on those dates.

[4] The Federal Court Registry, issued a notice of hearing dated 29 April 2022 informing all parties that the hearing of the appeals is scheduled on 15 August 2022 to 26 August 2022. Therefore, any change in counsel was done with full knowledge of the dates that have been fixed for hearing.

[5] Then, on 26 July 2022, the court received a letter from the appellant's former solicitors, Messrs Shafee & Co stating that the appellant had discharged them as his solicitors on record. This is in encl. 237. The former solicitors clearly indicated that the choice to discharge the former solicitors was the appellant's. Messrs Shafee & Co stated as follows:

> 2. Sila ambil perhatian bahawa pada 25 Julai 2022, jam lebih kurang 5.00 petang, **pihak kami telah menerima sesalinan surat dari Dato' Sri Mohd Najib Bin Hj Abd Razak ("Perayu")** yang mana Perayu telah memberhentikan (discharged) dengan serta merta Tetuan Shafee & Co. daripada bertindak sebagai kaunsel dan peguamcara yang mewakili beliau di dalam Rayuan-Rayuan Jenayah ini dan Prosiding-Prosiding berkenaan. Menerusi surat yang sama, Perayu telah memaklumkan bahawa beliau telah melantik Tetuan Zaid Ibrahim Suflan TH Liew & Partners ("ZIST") sebagai peguamcara.
>
> (emphasis added)

[6] It is obvious that the appellant took it upon himself to discharge his solicitors to the present ones, Messrs Zaid Ibrahim Suflan TH Liew & Partners ('Messrs Zaid Ibrahim') who in turn appointed Tuan Hj Hisyam Teh as lead counsel.

[7] Messrs Zaid Ibrahim thereafter wrote to court *vide* a letter dated 26 July 2022 notifying and confirming the change of solicitors. Their letter is to be found in encl. 239. In this letter, Messrs Zaid Ibrahim requested for an urgent case management and sought permission to participate in a case management that was already fixed on 29 July 2022. They also stated their intention to put on record their motion to adjourn for the reason that "a wholly new team has taken over the conduct of the above matter".

[8] The court's reply is to be found in encl. 245 which contains a letter dated 28 July 2022 stating two things. Firstly, the Deputy Registrar of the Federal Court, Puan Wan Fatimah Zaharah binti Wan Yussof, confirmed the case management on 29 July 2022 and secondly, indicated the court's directions that the hearing of the appeals would proceed as scheduled on 15 August 2022 to 26 August 2022. In short, the court refused the adjournment.

[9] It is to be noted that despite having been discharged by the appellant on 25 July 2022, the appellant's former counsel Tan Sri Shafee Abdullah had nonetheless attended the case management on 29 July 2022. This is reflected in the court's minutes for case management on 29 July 2022.

[10] The case management minutes on 29 July 2022 also disclose that Tan Sri Shafee had advised the court that the digital copies of the records of appeal had been uploaded and shared with the new counsel, Messrs Zaid Ibrahim on 22 July 2022. This is despite discharge only having been effected subsequently on 25 July 2022.

[11] Finally, the minutes also state that the court reminded parties, no less than four times, that the appeals will proceed as scheduled notwithstanding the change in solicitors.

[12] It is against this backdrop that an adjournment is sought once again.

Decision

The Law On Adjournments

[13] It is beyond settled that though the courts have absolute discretion to grant or refuse adjournments, such discretion must be exercised judiciously. What are judicious hinges on a proper and wholesome consideration of the facts and circumstances of the case before making a decision.

[14] In the context of this case, we accept unreservedly the notion that the right to a fair trial is part and parcel of the right to life and personal liberty guaranteed by art. 5(1) of the Federal Constitution. See: *Yahya Hussein Mohsen Abdulrab v. PP* [2021] 9 CLJ 414; [2021] 5 MLJ 811. The right of the accused to meaningful legal representation by counsel of his choosing is another important component of the right to a fair trial. This much is also apparent from art. 5(3) of the Federal Constitution but we hasten to add that this right is not absolute.

[15] This leads us to the primary reason given by counsel for the appellant in favour of an adjournment which we stated earlier. In short, an adjournment ought to be granted because the new defence team needs adequate time to prepare. In the other words, they are not ready.

[16] We start by saying that we agree that in appropriate cases, where counsel is not ready to proceed for legitimate reasons, the court should be minded to adjourn a cause or matter. We do not think this is the case here.

[17] Firstly, from our narration of the procedural history on the fixing of these appeals, all parties to this matter, including the appellant, were well aware that the appeals had been fixed for hearing on 15 to 26 August 2022 since April 2022 and the request for an adjournment on the same ground had been refused.

[18] In this regard, we find r. 6(a) of the Legal Profession (Practice and Etiquette) Rules 1978 ('1978 Rules') most relevant. It stipulates thus:

> **Rule 6. An advocate and solicitor not to accept brief if unable to appear**
>
> (a) An advocate and solicitor shall not accept any brief unless he is reasonably certain of being able to appear and represent the client on the required day.

[19] Thus, where counsel has accepted a brief, he should be deemed as 'reasonably certain of being able to appear and represent the client on the required day'. The 1978 Rules also appear to recognise the general disposition of the courts in this country to disfavour adjournments unless cogent reasons are provided. The general rule is that counsel shall make every effort to be ready for trial (and we think by extension appeals) on the day fixed. See: r. 24(a) and (b) of the 1978 Rules.

[20] The 1978 Rules are not, in a sense, binding on the courts. But they are nevertheless binding on members of the Bar who are obliged to comply with them. And they are indicative of the fact that any disciplined lawyer such as the counsel for the appellant would not have accepted a brief with dates already fixed for hearing unless he was prepared.

[21] In fact, the appellant having been well aware of the dates fixed for hearing elected to discharge his former solicitors and appoint Messrs Zaid Ibrahim and Tuan Hj Hisyam Teh as his solicitors and counsel respectively. This is his right to do so but he cannot, after having made that decision, turn around and say that his new lawyers are not ready to proceed with the hearing of the appeals. The new lawyers too, having accepted the brief, are not entitled to say they need more time to prepare knowing fully well that the dates had been fixed well in advance.

[22] Given the circumstances we have outlined, the request for the adjournment and the grounds in support thereof are neither cogent nor reasonable.

[23] In this regard, we recall the following words of Harun J from *PP v. Mohtar Abdul Latiff* [1980] 1 LNS 62; [1980] 2 MLJ 51, at pp. 51 to 52:

> In any criminal trial, there are three parties, the court, the prosecution and the defence. If dates of hearing are to be fixed at the convenience of all three parties, then trial dates will be fixed at some considerable time hence. There is of course no guarantee, as happened in this case, that the trial will go on as scheduled on the date fixed, if everyone's convenience

> is taken into account. The general rule, therefore, has always been that trial dates are fixed at the convenience of the court, on a first-come-first-served basis. This is fair to all concerned. Public funds are not wasted on idle courts when there is so much work to do.

[24] The stark reality is that considerable public funds would be wasted if granting an adjournment in a case of this kind was an easier option. Article 8 of the Federal Constitution and the rule of law demand that the appellant be treated just like any other accused. As such, we state again that while the appellant is entitled to his right to change his counsel, he is not entitled to make this choice at the expense of the court, the prosecution or the entire justice system.

[25] While on this subject, another very significant component of the right to a fair trial is that justice cannot be unduly delayed. In this regard, we remind ourselves of Arahan Amalan Ketua Hakim Negara No. 2/2003 which states that cases of this nature must be prioritised.

[26] Further, the time taken on this case, especially the number of days fixed for hearing means many other criminal cases and accused persons have had to wait their turn for their appeals to be heard. Justice delayed in this case is also justice denied to other accused persons. In this regard we echo the following words of Richard Talalla J in *Lai Cheng Chong v. PP* [1993] 1 LNS 33; [1993] 3 MLJ 147, at p. 151:

> At no time has it been truer to say that justice delayed is justice denied. It cannot be disputed that at this point of time, justice is so delayed in our courts as to amount to denial. There is a huge backlog of cases. Statistics indicate that a main cause for this unfortunate situation is adjournment and postponement of trials on the date appointed for trial, largely occasioned by counsel applying for the same on a variety of grounds, most of them avoidable if counsel's affairs were managed fairly and reasonably, bearing in mind counsel's duty not only to the client but also to the court and the public at large.

[27] For these reasons, the appellant's motion to adjourn and vacate these appeals for a period of at least three to four months is unanimously refused.